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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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October 30, 1997

William F. Caton, Acting Secretary
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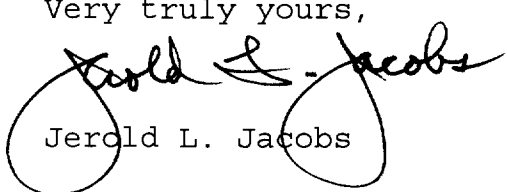
Re: MM Docket No. 97-182
Preemption of State and Local Zoning

Dear Mr. Caton:

On behalf of our client, Radio Property Ventures, licensee of Station KXEN(AM), Festus-St. Louis, Missouri, enclosed herewith for filing are an original and nine (9) copies of its "Comments of Radio Property" in the above-referenced rulemaking proceeding.

Please direct any communications or inquiries concerning this matter to the undersigned.

Very truly yours,


Jerold L. Jacobs

Enc.

cc: Keith A. Larson, Assistant Chief
Susanna Zwerling (Both FCC - By Hand) (Both w/enc.)

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of

Preemption of State and Local Zoning and
Land Use Restrictions on the Siting,
Placement and Construction of Broadcast
Station Transmission Facilities

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MM Docket No. 97-182

TO: The Commission

COMMENTS OF RADIO PROPERTY VENTURES

RADIO PROPERTY VENTURES ("RPV"), licensee of daytime Station KXEN(AM), Festus-St. Louis, Missouri, and permittee for a 500-watt nighttime KXEN operation, by its attorneys, pursuant to §1.415 of the Commission's Rules, hereby submits Comments in response to the Notice of Proposed Rule Making ("NPRM") herein, FCC 97-296, released August 19, 1997, and urges that the proposed preemption of state and local laws, regulations and restrictions on the siting of broadcast transmission facilities should be extended to more explicitly embrace and protect existing AM broadcast facilities that are threatened with land condemnation. In support whereof, the following is shown:

I. Introduction

1. Station KXEN(AM) has been licensed to serve the communities of Festus and St. Louis, Missouri on 1010 kHz since May 10, 1951. It currently operates daytime-only with 50 kilowatts of power and a six-tower directional array. However, for almost 12 years, RPV has been attempting to implement a viable Commission authorization for a 500-watt nighttime facility. The most recent material before the Commission (File No. BMP-950918AC) provides for the addition of a three-tower night directional array immediately adjacent to KXEN's daytime directional array.

2. KXEN's existing transmitter site is located on Chain of Rocks Road east of Highway 111 and north of Route 270 in Pontoon Beach, Illinois. The new nighttime towers would be placed on the northern portion of the existing site. The total structure height (including base pier and insulator) is 199 feet. Because the closest airport is located 7.6 kilometers away, no FAA approval is needed and the towers do not require marking or lighting. Thus, although Festus-St. Louis is located within a Top-30 television market (DMA #21), a factor that is of special interest in this proceeding (see NPRM, ¶19), KXEN's transmitter site is in an essentially rural area.¹ Under these circumstances, one might not expect that any broadcast-related zoning or land use preemption issue would arise. However, as RPV will now elaborate, KXEN is faced with a serious governmental threat to its very broadcast existence as well as a challenge to its ability to modify its facilities to establish nighttime radio service in the Festus-St. Louis market.

II. The Commission Should Preempt the Use of Condemnation Procedures Against All Broadcast Properties

3. In Madison County, Illinois, while RPV is working diligently to turn its daytime facility into a full-time outlet, a local land developer seeks to enrich itself at RPV's expense. A company called Real/Vest, Inc. and Tower Development Company ("Real/Vest") recently notified Mr. Burt Kaufman, RPV's Managing General Partner, that it has plans to ask a governmental entity to file a motion to condemn and immediately re-title to Real/Vest as a developer in an "Enterprise Zone" some or all of KXEN's broadcast property under the ¶7-103 "quick-take" procedure of Illinois' Eminent Domain Act (Ill. Rev. Stat. 1987, ch. 110, ¶7-101

¹ In fact, the KXEN tower site is literally surrounded by thousands of acres of farmland in active cultivation. The nearest city of any size (Granite City, 1990 U.S. Census pop. 32,682) is more than five miles away.

et seq.).² The sole "public interest" justification for this outrageous proposal is to allow Real/Vest to commercially develop RPV's existing transmitter site, a site which RPV has owned for almost 30 years!³

4. RPV has been attempting to persuade Real/Vest that its plan is preempted by Federal law and will be vigorously opposed by RPV in Federal District Court if Real/Vest does not abandon its stated intentions. However, it appears increasingly likely that Real/Vest and Illinois state officials will need a formal pronouncement by the Commission to convince them that they cannot use their standard land condemnation procedures to favor a commercial development over radio broadcast service. The public interest detriment of Real/Vest's condemnation efforts is especially obvious in this case, since KXEN -- a Christian religious broadcasting station -- is one of only two operating radio stations licensed to Festus, Missouri.

² "Quick-take" is a procedure under Illinois state law that is particularly terrifying for KXEN, or any citizen for that matter. With the blessing of the appropriate condemning authority, "quick-take" allows an Enterprise Zone developer to obtain title to the subject real property within ninety (90) days and dispossess the former owner forthwith.

³ Real/Vest has taken options on over 1700 acres of farmland surrounding KXEN's tower site, every acre of which looks just like the other. KXEN's acreage is situated in a sector that Real/Vest deems especially valuable for development, regardless of the sameness of the topography, but such perceived value would not exist but for the fact that the area was recently (March 1997) designated as an Enterprise Zone. This designation provides extremely attractive tax inducements to buyers and would-be tenants, lowering the end-cost of their relocation to the area. Developers working in such Zones are engaged in a highly speculative investment which frequently doesn't succeed. The Zones also have a notorious history of packing into one area a mass of commercial entities of questionable desirability and longevity. Frequently the hoped-for influx of new tax revenues which woo the adjoining communities into supporting these ventures never materializes, but the high costs of providing municipal services for the area is a fixed and unwelcome outcome. The loss of KXEN's broadcast site, and possibly KXEN's existence, would be but one more casualty of Real/Vest's greed. The Commission should not look favorably upon trading an excellent broadcast license for warehouses and shipping docks, at best, and a partially complete, derelict, dysfunctional back-alley commercial installation, at worst.

Historically, the Commission has been especially concerned about stations' well-being where there are so few local radio services.

5. The Communications Act of 1934 (the "Act") was amended by the Telecommunications Act of 1996, P.L. No. 104-104, 110 Stat. 56 (1996), to place important limitations on the power of local zoning authorities to prohibit the siting of communications services. Specifically, 47 U.S.C. §332(c)(7)(B)(i)(II) was added, which prevents State and local zoning authorities from regulating the "placement, construction, and modification of personal wireless service facilities" in such a way as to prohibit them. RPV fully supports, as a matter of reasonable statutory interpretation, the rulemaking proposal put forward by the National Association of Broadcasters and the Association for Maximum Service Television to extend these preemptions to "all State and local land use, building, and similar laws, rules or regulations that impair the ability of licensed broadcasters to place, construct, or modify their transmission facilities."

6. KXEN's plight amply illustrates why Federal preemption of zoning and land use ordinances should be applied in the broadest manner possible for the benefit and protection of all broadcast licensees and the paramount public interest. In 1996, Congress made a legislative determination by adding §332(c)(7)(B)(i)(II) to the Act that FCC-licensed communications services were entitled to primacy over local and state zoning and land use regulations that are not properly grounded in health or safety concerns. And even as to health and safety concerns, the Commission has already preempted the regulation of radio frequency emissions, interference effects on existing or potential telecommunications providers and end users, and tower lighting, painting, and marking requirements.

7. Thus, RPV fully endorses the preamble and Paragraph (b)(2) of the NPRM's

Appendix B proposed preemption rule. Specifically, as stated in the preamble language, RPV believes that the Commission should adopt an omnibus preemption rule which applies to the siting of new and modified or relocated broadcast transmission facilities of all radio and TV stations whose operations have been authorized by the Commission. Moreover, RPV fully supports the language in Paragraph (b)(2) that preempts any state or local land-use, building, or similar law, rule or regulation which impairs the ability of an authorized radio or TV station to place, construct, or modify its broadcast facilities, unless the promulgating authority can demonstrate that such regulation is reasonable in relation to a clearly defined and expressly stated health or safety objective other than those whose preemption was mentioned in Paragraph 6 above.

8. In KXEN's case, it is quite clear that no health or safety concern is implicated in Real/Vest's condemnation plan. Rather, Station KXEN's 45-year history of broadcasting in the public interest, the Commission's 45-year-old frequency allocations determination, and the emergence of KXEN's nighttime service are seriously threatened by a private land developer who is attempting to tantalize government officials with visions of tax revenues derived from commercial development -- a developer who is interested in self-enrichment at the cost of putting KXEN out of business. In other words, the public interest in a local full-time radio broadcast service in Festus-St. Louis is in danger of being sacrificed to Real/Vest's private economic interest, using the Illinois Eminent Domain Act and its "quick take" condemnation procedure as the knife. Where, as here, RPV has been working diligently to upgrade KXEN's authorized nighttime facilities, and the successful conclusion of that effort and KXEN's very existence have been called into question, it is clear that using Illinois' land condemnation statute against KXEN

is the very type of improper action that Section 332(c)(7) of the Act and this current rulemaking effort to interpret and apply said Section are intended to prevent.

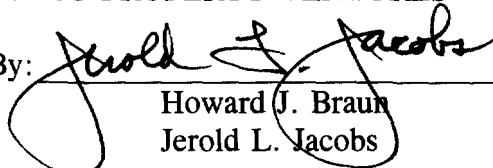
III. Conclusion

9. Using the kind of anecdotal evidence that the Commission invites in Paragraph 19 of the NPRM, RPV has demonstrated herein that there is a definite need for a Commission preemption rule concerning transmitter tower siting and construction which clearly goes beyond new or modified DTV/TV towers and expressly encompasses existing towers for all types of broadcast services and in all size markets. Only in this way will established broadcasters such as RPV be protected against arbitrary and capricious zoning and land-use intervention designed to serve the self-interest of non-broadcast economic competitors, such as Real/Vest. In the realm of local and state law, it is only the Commission that, by preemption, can ensure that its public interest determinations concerning radio and TV broadcast authorizations will not be thwarted by non-broadcast profit-driven ends. Therefore, RPV urges that the Commission should amend and expand with specificity its broadcast rules in accordance with Appendix B of the NPRM.

Respectfully submitted,

RADIO PROPERTY VENTURES

By:



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Dated: October 30, 1997